Filed 4/7/09 Dome Entertainment Center v. Kim CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

DOME ENTERTAINMENT CENTER, INC., Plaintiff and Respondent, v. ODES H. KIM, Defendant and Appellant.	B196220 (Los Angeles County Super. Ct. No. BC286176)

APPEAL from a judgment of the Superior Court of Los Angeles County. Joseph Kalin, Judge. (Retired judge of the L.A. Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Bird, Marella, Boxer, Wolpert, Nessim, Drooks & Lincenberg, Ekwan E. Rhow, Thomas R. Freeman and Thomas V. Reichert; Greines, Martin, Stein & Richland, Kent L. Richland and Edward L. Xanders for Defendant and Appellant.

Manatt, Phelps & Phillips, William S. Brunsten, Benjamin G. Shatz and Becky S. Walker for Plaintiff and Respondent.

This matter involves the lease of commercial space in an entertainment complex at the site of the Cinerama Dome in Hollywood. Dome Entertainment Center, Inc., sued Odes Kim for breach of the lease and a jury awarded Dome $3,765,569. Kim appeals from the judgment, contending the trial court erred in granting Dome's motion for judgment on the pleadings on the issue of whether Dome and Kim entered into a valid and enforceable lease. We affirm.

FACTS

I. The Negotiations

In the summer of 2000, Dome began construction on its plan to renovate the Cinerama Dome and construct the ArcLight movie theaters, additional retail and restaurant space, a health club, and a parking garage. In the latter half of 2001, Dome discussed with Jim Kidder and Brad Belletto about leasing out some of the space for a restaurant, VIP lounges, bars, and dance areas. Kim was brought in by Kidder and Belletto to provide financing for the project. The parties began to negotiate terms in February 2002. On March 1, 2002, Dome sent Kim a lease package. The lease package included an "Exhibit D," which showed a plot plan setting forth the general boundary lines for the walls and corridors and "identify[ing] the space . . . being leased by the tenant." The plot plan identified approximately 27,000 square feet of space to be leased by Kim that sat behind 5,000 square feet of retail space fronting Sunset Boulevard. The space fronting Sunset Boulevard was not a subject of the lease agreement and the 27,000 square feet behind it that Kim planned to turn into a restaurant and lounge did not have access to Sunset Boulevard under the initial plot plan.

Kim revised the plot plan to include an access walkway to Sunset Boulevard from the leased space. Kim believed a walkway connecting the restaurant to Sunset was essential to the restaurant's viability "because it would increase customers (by increasing foot traffic) and restaurant capacity (by adding another fire exit)." On March 2, 2002, Kim faxed Dome copies of a signed signature page, a security deposit check, and the revised plot plan that showed an access walkway to Sunset with a the word "optional"

over the front retail space. Kim testified he included the word "optional" because he wanted to indicate that he could lease that space if needed.

Dome's in-house lawyer, who received the fax, testified he thought the Sunset walkway was a mistake and he was confused about what Kim meant by the word "optional." To his recollection, Kim had not asked for a corridor extending to Sunset. As a result, the attorney stated in a March 4, 2002 letter that Dome "does not object to adding an access corridor to the back of Mr. Kim's space" and "therefore revised the site plan to indicate the same." Dome's revised plot plan showed a service corridor running to the rear entry doors with a VIP entry but with no access to Sunset.

On March 5, 2002, Kim sent Belletto a mark-up of Exhibit D showing the lack of access to Sunset. On March 5, 2002, Belletto faxed Dome's in-house counsel another plot plan labeling the corridor as a "walkway" and extending north from the restaurant to Sunset with a VIP entry at the rear doors. The plot plan also had the word "optional" over the space fronting Sunset, indicating their understanding that he and Kim could lease that space as necessary. On March 6, 2002, Dome's in-house counsel faxed a note to Kim and his attorney stating Dome had "further revised" Exhibit D at Belletto's request. The enclosed plot plan included the same service corridor that did not access Sunset and added reference to a VIP entrance.

That day, Kim executed the lease package and initialed the pages, including a revised Exhibit D that depicted an accessway extending to Sunset Boulevard. Dome's in-house counsel received the lease package and saw it contained the revised Exhibit D. He sent an e-mail to Kim's counsel, Richard Kim,[1] stating, the package "appears to be in good shape. I will substitute the revised Plot Plan circulated this morning with the current plan behind Exhibit D . . . ."

Dome countersigned the lease and sent the package to its lender for approval. On March 20, 2002, Dome returned the countersigned lease package to Richard but did not

---

[1] For ease of reference, appellant Odes Kim will be referred to as "Kim" while his attorney Richard Kim will be referred to as "Richard."

again mention it had substituted Exhibit D. In a letter dated April 3, 2002, Richard complained, "it is time to reform or rewrite the lease agreement . . . ." to exclude Jim Kidder from the project in light of his recent insolvency. Richard then listed issues for reformation of the lease, including Kim's desire to lease all of the space fronting Sunset as well. There was no mention of a walkway leading to Sunset as a ground for contract reformation. On May 9, 2002, Richard submitted a preliminary floor plan for the leased space that did not include the space fronting Sunset or a walkway connecting to Sunset. In June 2002, Dome gave Kim a Notice of Delivery of Premises, required under the lease, informing Kim that he could begin construction of his tenant improvements to the premises.

II. The Lawsuits

On July 10, 2002, Kim filed suit against Dome and others for breach of lease, fraud, negligence, and unfair competition. Kim also filed a notice of lis pendens where he alleged he was the "lessee" of a part of the entertainment complex. Both of Kim's subsequently amended complaints also alleged a valid and enforceable lease with Dome and attached a copy of the lease, with Dome's Exhibit D showing no walkway to Sunset. Dome, in turn, filed an unlawful detainer action against Kim for failure to pay rent, also attaching the lease with Dome's Exhibit D. On January 21, 2003, Kim signed a verified answer admitting to the allegation that a valid lease, including Dome's Exhibit D, was attached to the unlawful detainer complaint.

Subsequently, Kim fired Richard and hired Brian Chavez-Ochoa, who dismissed Kim's lawsuit against Dome and executed a stipulation to surrender the premises back to Dome, intending to "eliminate from this Action the issue of possession and right to possession of the Premises." Ochoa acknowledged in the stipulation that Dome was a "landlord" and Kim was a "tenant" who "hereby delivers, surrenders and, pursuant to California Civil Code § 1951.3 disclaims and abandons, possession of the Premises to Dome as well as any and all right to possession of the Premises." As a result, Dome converted its unlawful detainer action to one for damages and filed a first amended complaint on March 11, 2003.

III. Kim Denies Validity of the Lease

On April 19, 2003, Ochoa answered for Kim and denied a valid lease existed between the parties. Kim also filed a cross-complaint on April 22, 2003, for breach of lease and indemnification. Kim's cross-complaint, as well as its two subsequent amendments, attached the lease with Dome's Exhibit D. In his cross-complaint, Kim alleged he was fraudulently induced to enter into the lease. He alleged Dome forced Kim to agree to use Kidder, who was insolvent, as a guarantor, which would "surely lead to a default" by Kim under the terms of the lease. Kim further alleged Dome and Kim entered into a lease agreement with the understanding that if Kim signed the lease "as is" in February 2002, he would be allowed to rent the additional space fronting Sunset at no additional cost and that space would be set aside for a "hallway." The trial court sustained Dome's demurrer to Kim's cross-complaint without leave to amend in February 2004.

On May 3, 2005, the trial court gave Dome leave to file a second amended complaint in its breach of lease action to add a cause of action for fraud. Kim continued to deny the existence of a valid lease and asserted that a contract was never formed as part of his affirmative defenses to Dome's breach of lease action. Kim then moved for summary judgment on the ground, among others, that a contract was never formed between the parties. Dome in turn filed a summary judgment motion on the ground the lease was fully executed and delivered on March 20, 2002, and that Kim was estopped to deny the validity of the lease due to the judicial admission in Kim's verified answer to Dome's complaint.

In support of Kim's opposition to Dome's summary judgment motion, Richard submitted a declaration stating he did not know about the switch out of Exhibit D. Among other things, Richard declared he was "not responsible for negotiation of Exhibit D and was not familiar with the design issues necessary to properly negotiate Exhibit D . . . . [¶] . . . [¶] . . . My understanding is that on March 7, 2002, [Dome's in-house counsel] switched out Odes Kim's Exhibit D with a different version prepared by Dome. Prior to March 6, 2002, I never gave Dome approval to use an Exhibit D different from

the one approved and initialed by Odes Kim on March 6, 2002. After March 6, 2002, I never gave any such approval to switch out Exhibit D. To the contrary, throughout my discussions with Dome, I told Dome that Odes Kim would only accept his version of Exhibit D. [¶] . . . I was never informed of the 'switch out' by Dome."

Richard further stated, "In preparing for [the lawsuit filed by Kim], which was initiated in July 2002, I remained in the dark as to the 'switch out' that occurred. Accordingly, I used the March 20, 2002 lease package that Dome countersigned as the operative document. Again, my overall goal during the litigation was to move the parties closer to an acceptable deal. If I had known of the 'switch out,' I would have used different language and pleaded different claims in my pleadings." Richard also declared he never had Kim review any drafts of the pleadings, including the answer which Kim verified, or any discovery responses. Instead, those documents were drafted based on Richard's "own assumptions of the facts."

Kim's second attorney, Ochoa, also submitted a declaration stating he attached Dome's Exhibit D to Kim's cross-complaint without realizing it was the wrong one. Ochoa further stated that he executed the stipulation but did not draft it and "did not intend to stipulate to any facts other than the surrender of the premises." In a July 13, 2005 order, the trial court denied Kim's motion for summary judgment, finding triable issues of material fact existed. The court also put Kim's motion for summary adjudication and Dome's summary judgment motion off calendar due to procedural defects, finding the parties' separate statement failed to comply with the format requirement of California Rules of Court, rules 342(b) and (h). Despite the procedural defects, the trial court alerted the parties that:

> "If the Court were to rule on the merits[,] it is likely it would rule as follows: [¶] . . . [¶] . . . C/A 1 fails because Kim never accepted Plaintiff's counteroffer and a contract was never formed: **DENIED**. There can be no triable issue of material fact in this regard, as it is undisputed that Kim has repeatedly acknowledged the validity of the subject lease, including Plaintiff's exh. 2 as exh. D thereto in judicial proceedings including the complaints and cross-complaints filed in the Kim action and herein, the lis pendens filed by Kim, Kim's verified Answer to the

> [unlawful detainer] action filed 11/22/04 and the Stipulation executed by Kim's former counsel (Ochoa). See evidence offered by Plaintiff in support of facts 137-164. The acknowledgment [by] Kim operate as a judicial admission, which is conclusive herein, also Kim is judicially estopped from taking a position in this case which is contra to that which he previously took in the Kim cases and [unlawful detainer] case."

The court concluded, "[A]ssuming the parties were to waive the procedural defects, the Court would likely be inclined to adjudicate that the lease attached to the 2nd amended complaint herein was in fact valid and enforceable. Thus there is no triable issue of fact in that regard."

IV. Dome's Motion for Judgment on the Pleadings

On July 29, 2005, Dome filed a motion for judgment on the pleadings with respect to any affirmative defenses asserted by Kim, which were based on the contention that the lease was never formed. Dome's motion further sought an order precluding Kim from arguing to the jury that the lease was invalid and an instruction advising the jury that it had already been determined that a valid and enforceable lease existed between the parties. In support of his opposition to Dome's motion for judgment on the pleadings, Kim submitted the evidence attached to the parties' summary judgment motions, including the declarations by Richard and Ochoa disclaiming knowledge of the Exhibit D switch. The trial court granted Dome's motion for judgment on the pleadings and motion in limine on August 22, 2005, taking judicial notice of the verified answer and the stipulation by the parties. Based on these documents, the trial court reasoned that the statements made therein were to be considered judicial admissions of the validity of the lease. The court further found that a pleading is not considered superseded by virtue of being verified.

Kim then filed a petition for writ of mandate challenging the order granting the motion for judgment on the pleadings. We issued an order under *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180, directing the trial court to vacate its order and issue a new order denying the motion for judgment on the pleadings. Upon

further briefing, we denied the petition and dissolved the order temporarily staying the trial in the matter.

A jury trial began on Dome's claim for breach of the lease on October 10, 2006. The jury returned a verdict finding Kim breached the lease and awarded Dome nearly $3.8 million in damages. The trial court then awarded Dome $1,872,453 in attorney fees and costs. Kim appeals from the judgment and fees award.

DISCUSSION

Kim casts this appeal as one in which the trial court improperly took from the jury the opportunity to decide whether a valid lease between the parties existed. We find no error in holding Kim to the position he took in a verified answer, among other filings through years of litigation, that there existed a valid lease between the parties.

I. Kim Failed to Allege Facts Sufficient to State a Defense

Kim argues the admissions he made in his verified answer were superseded by the May 2005 answer to the second amended complaint. According to Kim, superseded pleadings may be used at trial as admissions against interest, but are not judicial admissions. If Kim's admission in the verified answer was an evidentiary admission against interest, then the jury should have been presented with evidence of it and a new trial is warranted. If the allegations in his verified answer are judicial admissions, on the other hand, the issue is taken from the jury. (*Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 426 (*Deveny*).)

Witkin advises that a superseded pleading is "of course" not a judicial admission. (1 Witkin Cal. Evidence (4th ed. 2000) Hearsay, § 97, p. 799.) Therefore, if we find that Kim's verified complaint was superseded, Kim argues that is the end of the inquiry–his verified answer should have been presented to the jury as an evidentiary admission. We disagree. Whether Kim's verified answer was superseded by his May 2005 answer is not an issue we need now decide.

Even if the verified answer was superseded and is not a judicial admission, an amended pleading that contradicts facts alleged in an earlier pleading is nevertheless subject to challenge. (*Owen v. Kings Supermarket* (1988) 198 Cal.App.3d at pp. 383-384

["the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint."].) Unless the contradiction is satisfactorily explained, the rule requiring truthful pleading may render the pleading subject to a demurrer, motion for judgment on the pleadings or motion to strike. (*Amid v. Hawthorne Community Medical Group, Inc.* (1989) 212 Cal.App.3d 1383, 1390 (*Amid*); *Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929, 946 [court not bound to accept as true allegations contrary to facts alleged in former pleadings]; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) ¶ 6:706, p. 6-177.)[2] The first issue to be decided, then, is whether the contradiction was satisfactorily explained.

A. Kim Failed to Proffer a Satisfactory Explanation

In *Amid, supra*, 212 Cal.App.3d at pages 1389-1391, a hospital sent a copy of a surgeon's negative peer review evaluation to a health insurer. The surgeon brought suit, alleging breach of contract. The hospital demurred on the ground the complaint failed to allege the specific contractual term that was breached. After four amendments in which the surgeon adopted a position that there was no express nondisclosure term, the surgeon alleged a specific breach of an oral contract of nondisclosure. (*Id.* at pp. 1389-1390.) The contradictory allegation was properly disregarded and a demurrer was sustained

---

[2] The dissent distinguishes *Amid, supra*, 212 Cal.App.3d 1383, and *Vallejo Development, supra*, 24 Cal.App.4th 929 on the ground that the procedural posture in those cases is "far different" from the one presented in this matter. *Amid* and *Vallejo Development* involved plaintiffs who changed the allegations in their complaints in response to successful demurrers, while Kim did not change his answer to cure some pleading defect that was exposed as a consequence of a previous attack. We see no reason, however, to treat a defendant who changes his story in his answer differently from a plaintiff who changes his story in a complaint, especially when the allegations contained in an answer are not usually challenged. Here, Kim first denied the existence of a valid lease in his answer to Dome's first amended complaint. Rather than challenge Kim's answer, Dome sought and was given leave to file a second amended complaint to add a fraud claim. Kim again denied the existence of a valid lease in his answer to the second amended complaint. At that point, Kim's assertion was challenged in Dome's summary judgment motion.

without leave to amend: " 'the policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so the court may disregard the inconsistent allegations.' " (*Id.* at p. 1390.)

Similarly here, Kim adopted a position that there existed a valid lease between the parties in his prior pleading. Then, when it no longer benefitted him to take this position, he alleged that no valid lease existed. Such a contradictory position, absent inadvertence or mistake, is not permitted under the sham pleading rule. Kim contends his attorneys' declarations are sufficient evidence of inadvertence and mistake. According to Kim, *any explanation* by a party, *however incredible*, prohibits the trial court from eliminating a defense on a motion for judgment on the pleadings because the trial court may not weigh any evidence to judge whether the explanation was believable, truthful or adequate.

In support of his contention, Kim relies on *Schabarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1216 and *Amid*, *supra*, 212 Cal.App.3d at page 1387. Neither of these cases hold that any explanation is sufficient, however. Instead, these cases merely stand for the proposition that when no explanation is offered, adequate or otherwise, a court may disregard the inconsistencies. The general rule is that material factual allegations in a verified pleading that are omitted or contradicted in a subsequent amended pleading without "adequate" explanation may be considered by a court in ruling on a challenge to the later pleading. (*Shoemaker v. Myers* (1990) 52 Cal.3d 1, 12.) It is clear that the explanation must be "very satisfactory," *Tognazzi v. Wilhelm* (1936) 6 Cal.2d 123, 127, and the pleader must provide "sufficient" evidence of mistake, *Deveny, supra*, 139 Cal.App.4th at page 425. (See also *American Advertising & Sales Co. v. Mid-Western Transport* (1984) 152 Cal.App.3d 875, 879 [order denying motion to file amended complaint affirmed due to "self-serving" declaration]; Weil & Brown, *supra*, ¶ 6:708, p. 6-178.)

Not surprisingly, the parties disagree which level of review we are to use in this matter. Kim argues our review is de novo because the appeal challenges the grant of a motion for judgment on the pleadings. (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1401.) Dome argues we must review for abuse of discretion because the trial court in effect refused to consider a sham pleading. (*Rivercourt Co. Ltd. v. Dyna-Tel, Inc.* (1996) 41 Cal.App.4th 1477, 1480.) Further, Dome contends substantial evidence supports the trial court's resolution of disputed facts (i.e., conflicting allegations). (*American Advertising & Sales Co. v. Mid-Western Transport, supra,* 152 Cal.App.3d at p. 879.)

In this case, we do not believe the standard of review is dictated merely by the title given to the motion filed by Dome. While it is true that the alleged error stems from a motion for judgment on the pleadings, it is not the case that the trial court merely examined whether Kim pled sufficient facts to survive such a motion. Instead, it was required to look beyond the four corners of the pleadings to determine whether the pleading was a sham. A trial court has, the inherent power to prevent an abuse of its process and peremptorily dispose of sham pleadings. (*Amid, supra,* 212 Cal.App.3d at p. 1391.) As a result, we examine the trial court's action for abuse of discretion and determine whether substantial evidence supports its ruling. We find substantial evidence exists and no abuse of discretion.

Here, both of Kim's attorneys stated that they were not aware of the Exhibit D switch. Yet, Richard was notified by Dome's in-house counsel that he would "substitute the revised Plot Plan . . ." on March 6, 2002. Richard also declared he was not responsible for negotiations of Exhibit D, yet felt free to draft pleadings, including a verified answer admitting to the validity of Exhibit D and discovery responses based on his "own assumptions of the facts." Ochoa signed a stipulation acknowledging the parties' status as "landlord" and "tenant," yet knew the validity of the lease was an issue when he answered the amended complaint soon thereafter. Kim's "evidence" is insufficient to demonstrate that a mistake was made in drafting the original verified answer.

B. Court Implicitly Weighed the Evidence to Reach its Conclusion

Kim further argues the judgment must be reversed because the trial court granted judgment on the pleadings based upon errors of law, not by weighing the evidence and resolving a disputed fact. While the trial court did not state whether it found Richard and Ochoa's declarations to be credible or not, it confirmed it "read and considered all declarations and exhibits filed in support of and in opposition to [Dome's motion for judgment on the pleadings and thereafter granted the motion.]" "All intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent." (*Wilson v. Sunshine Meat & Liquor Co.* (1983) 34 Cal.3d 554, 563.) We infer that the trial court made the findings necessary to reach its conclusion. As discussed above, substantial evidence supports a finding that the contradictory allegations were not due to inadvertence or mistake.

II. A Motion for Judgment on the Pleadings Was Proper

Kim also disputes the procedural mechanism by which the court dispensed of this issue. According to Kim, a summary adjudication motion was the only potential avenue to challenge the contradictory positions he took in the litigation because the court's decision involved the consideration of extrinsic evidence. A demurrer or motion for judgment on the pleadings may be asserted against an answer for failure to state facts sufficient to constitute a defense. (Code Civ. Proc., §§ 430.20, 438.) A motion for judgment on the pleadings has the same function as a demurrer but is made after the time for demurrer has expired. (Code Civ. Proc., § 438.) A motion for judgment on the pleadings allows a court to dismiss all or part of a pleading based on the contents of the pleading and judicially noticeable facts.[3] (*Id.*, subd. (d).) In any event, trial courts have the inherent power to control litigation and conserve judicial resources through whatever

---

[3] We disagree with Kim's contention that the trial court improperly considered extrinsic evidence in ruling on the motion for judgment on the pleadings. Here, the trial court properly considered the contents of the pleadings and judicially noticed Kim's prior verified answer. (Evid. Code, § 452; see also *Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71, 83.)

procedural vehicle reaches that result. (*Lucas v. County of Los Angeles* (1996) 47 Cal.App.4th 277, 284-285.)

Here, Dome not only filed a motion for judgment on the pleadings, it sought a motion in limine prohibiting Kim from presenting evidence or arguing that the lease was invalid. Both motions were properly granted.

III. Attorney Fees Award

Kim bases his appeal of the attorney fees award on the presumption that the judgment was in error and should be reversed. Because we affirm, the attorney fees award is proper.

DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BIGELOW, J.

I concur:

FLIER, J.

RUBIN, Acting P. J.:

I respectfully dissent.

I believe the majority errs by declining to address whether Kim's verified pleadings were superseded. Instead, I view that as the dispositive issue that requires us to reverse the judgment on the pleadings.

The general rule is that amended pleadings supersede earlier pleadings. Superseded pleadings may be given evidentiary effect, often for impeachment purposes. (*Meyer v. State Board of Equalization* (1954) 42 Cal.2d 376, 384-385.) As Witkin notes, "An allegation or failure to deny in a pleading superseded by later amendment is of course not a judicial admission. The majority of American jurisdictions, however, treat it as a prior statement of a party, i.e. as an evidentiary admission (unless made by mistake, inadvertence, or inadequate knowledge, which may be shown)." (1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 97, p. 799; *Walker v. Dorn* (1966) 240 Cal.App.2d 118, 120.)

The majority relies on so-called "sham pleading" decisions such as *Amid v. Hawthorne Community Medical Group, Inc.* (1989) 212 Cal.App.3d 1383 (*Amid*) and *Vallejo Development Co. v. Beck Development Co.* (1994) 24 Cal.App.4th 929 (*Vallejo Development*) to conclude that the trial court correctly treated Kim's earlier allegations about the validity of the lease as binding judicial admissions. However, that doctrine applies when "a party files an amended complaint and seeks to avoid the defects of a prior complaint either by omitting the facts that rendered the complaint defective or by pleading facts inconsistent with the allegations of prior pleadings. [Citations.] In these circumstances, the policy against sham pleading permits the court to take judicial notice of the prior pleadings and requires that the pleader explain the inconsistency. If he fails to do so, the court may disregard the inconsistent allegations and read into the amended complaint the allegations of the superseded complaint. [Citations]." (*Owen v. Kings*

Supermarket (1988) 198 Cal.App.3d 379, 383-384; see also *Hahn v. Mirda* (2007) 147 Cal.App.4th 740, 751 (*Hahn*); *Colapinto v. County of Riverside* (1991) 230 Cal.App.3d 147, 151-152 [sham pleading doctrine applies when "a party files an amended complaint and attempts to avoid the defects of the original complaint by either omitting facts which made the previous complaint defective or by adding facts inconsistent with those of previous pleadings"].) The purpose of the sham pleading doctrine is to let the courts prevent an abuse of process. It is not intended to "prevent honest complainants from correcting erroneous allegations or to prevent the correction of ambiguous facts." (*Hahn, supra,* at p. 751.)

Both *Amid, supra,* 212 Cal.App.3d 1383, and *Vallejo Development, supra,* 24 Cal.App.4th 929, involved changed pleading allegations in response to earlier orders sustaining demurrers to the plaintiffs' complaints. The procedural situation here is far different. Kim sued Dome for breach of contract. His first and second amended complaints attached copies of the disputed version of the lease with the switched-out floor plan. Dome filed an unlawful detainer action against Kim, and Kim's verified answer admitted that a correct copy of the lease, apparently including the disputed floor plan version, was correct. Kim and Dome later stipulated to the dismissal of Kim's contract action and the conversion of Dome's unlawful detainer action to one for breach of a lease. In response to Dome's first amended complaint, Kim raised unenforceability and lack of contract formation as affirmative defenses, then cross-complained for breach of lease, attaching once more the lease version with the switched-out floor plan. Finally, Kim's first and second amended cross complaints specifically alleged that Dome fraudulently misrepresented the amount of floor space in the lease. These final allegations were not made in an attempt to cure some pleading defect that Dome had exposed by an earlier attack on Kim's pleadings. Moreover, they were consistent with the affirmative defenses concerning unenforceability and contract formation that went unchallenged when raised as affirmative defenses in Kim's answer to Dome's first amended complaint in this action. Finally, I conclude Kim adequately explained – for

purposes of avoiding a charge of sham pleading – that he was honestly confused about which floor plan was attached to various documents filed with the court.

Based on this procedural backdrop, I believe the sham pleading doctrine does not apply. Instead, although Kim's prior pleadings give Dome ample ammunition for impeachment, they raise fact questions that a jury must decide.[1] Accordingly, I would reverse the judgment on the pleadings.

RUBIN, Acting P. J.

---

[1] Because the sham pleading doctrine does not apply, I have not discussed or analyzed the conflicting evidence and the credibility issues raised by Kim's version of events concerning his alleged failure to discover sooner that his floor plan had been switched out of the lease by Dome. In footnote 2 of its decision, the majority states that judicial notice was properly taken of the contents of the pleadings and Kim's verified answer, but makes no mention of the conflicting evidence from the parties' competing summary judgment motions. I take this to mean that the majority has not considered any of that evidence, and properly so. Judicial notice is not permitted as to the contents of declarations (*Kilroy v. State* (2004) 119 Cal.App.4th 140, 145), and is never proper if there is any possibility of a factual dispute (*Communist Party of the United States v. Peek* (1942) 20 Cal.2d 536, 546-547).